United Nations A/HRC/WGAD/2018/25

General Assembly

Distr.
20 September 2018
English
Original: French

**Human Rights Council**
**Working Group on Arbitrary Detention**

# Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

## Opinion No. 25/2018 concerning Étienne Dieudonné Ngoubou (Gabon)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 15 December 2017 the Working Group transmitted to the Government of Gabon a communication concerning Étienne Dieudonné Ngoubou. Having requested an extension of the deadline, the Government replied to the communication on 12 March 2018. The State is a party to the International Covenant on Civil and Political Rights (the Covenant).

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

**Submissions**

*Communication from the source*

4. Étienne Dieudonné Ngoubou is a 53-year-old Gabonese citizen resident in Libreville. Mr. Ngoubou is a former Minister of Energy and Oil.

5. Shortly before 11 January 2017, Mr. Ngoubou reportedly heard rumours that he was wanted by the authorities. The source explains that, based on these rumours, Mr. Ngoubou feared he would be arrested. As a result, he reported to the Gabonese judicial authorities, specifically the Director General of Investigations, of his own accord on 11 January 2017.

6. According to the source, Mr. Ngoubou was arrested and placed in pretrial detention on 12 January 2017. He has been detained at Libreville Central Prison since then. His detention is based on an order of 12 January 2017 by the senior investigating judge to whom the case was referred by the State prosecutor in accordance with article 76 of the Code of Criminal Procedure. According to the prosecutor's indictment, Mr. Ngoubou is charged with misappropriation of public funds in the exercise of his functions as director general and later minister. However, Mr. Ngoubou was not provided with any other details, and no evidence to substantiate the charge of misappropriation was presented.

7. According to the source, Mr. Ngoubou's lawyers and family were refused access to Libreville Central Prison on several occasions.

8. On 16 January 2017, Mr. Ngoubou filed an appeal against the investigating judge's order on the grounds that the judge clearly lacked jurisdiction to investigate the case and could therefore not order his detention. The source claims that only the High Court of Justice has jurisdiction *ratione personae* to rule on this case, as the alleged offences took place in the exercise of the minister's duties. This rule is set out in article 78 of the Constitution, according to which ministers are criminally responsible only before the High Court of Justice.

9. The source explains that the senior investigating judge claimed jurisdiction on the grounds that the investigation of cases brought before the Special Criminal Court is conducted by an investigating magistrate of the court of first instance at the seat of the Libreville Court of Appeal. The source claims that, in doing so, the senior investigating judge was confusing the Criminal Court with the High Court of Justice. Thus, there was no basis for the investigating judge to claim jurisdiction.

10. In view of these findings, the Prime Minister referred the case to the Constitutional Court for interpretation of article 78 of the Constitution.

11. On 13 March 2017, the Constitutional Court ruled that, on leaving office, ministers lost their jurisdictional privileges and were criminally responsible before the ordinary courts for offences committed in the exercise of their duties. However, the source alleges that this interpretation is incorrect and was made for the Court's own ends, since it is clear from article 78 of the Constitution that it is the date on which the acts were committed that determines the jurisdiction of the High Court of Justice and, in the present case, that would thus be the only court to have jurisdiction.

12. Mr. Ngoubou filed another appeal against the order for pretrial detention on the basis of an objection to the court's jurisdiction. On 28 March 2017, the appeal was declared admissible but was rejected by the indictment division, which did not give the grounds for its conclusions.

13. The source explains that, on 19 July 2017, Mr. Ngoubou's defence lawyer filed an application for release on bail on the basis of his state of health, in accordance with articles 115, 116 and 126 of the Code of Criminal Procedure. Mr. Ngoubou's type 2 diabetes had led to high blood pressure and, in addition, a diagnosis of the first signs of hearing loss, all of which was substantiated by a medical certificate and two medical reports produced in 2017 during his detention. The source explains that his state of health had deteriorated during his detention. The investigating judge never ruled on the merits of this application.

14. Consequently, the source explains that, on 31 July 2017, Mr. Ngoubou's defence lawyer referred the case to the president of the indictment division of the Libreville Court

of Appeal, in accordance with article 122 of the Code of Criminal Procedure. Under this article, the indictment division must make a decision within eight days of receipt of the application. If the division does not give a ruling by that deadline, the accused must automatically be released by the Prosecutor General. According to the source, these actions did not yield any results. However, under the aforementioned legal provisions, Mr. Ngoubou should have been released on 9 August 2017; there has thus been no legal basis for his detention since that date.

15. The source also explains that Mr. Ngoubou's defence lawyer wrote to the Prosecutor General on 14 August 2017, requesting his release. The Minister of Justice was also informed of the situation in a letter dated 14 August 2017. Furthermore, the senior management of the prison service decided to return Mr. Ngoubou to the prison despite his state of health and against his doctor's advice. On arrival, he was transferred to the military hospital and waited for an hour in the emergency room before being treated. Since then, proceedings have stalled and there has been no response to the defence lawyer's requests.

*Deprivation of liberty under category I*

16. The source alleges that, under the Constitution, only the High Court of Justice has jurisdiction over cases involving ministers. Consequently, the detention of Mr. Ngoubou ordered by the investigating judge is unconstitutional and devoid of any legal basis. Legal actions taken by a court that does not have jurisdiction are null and void and this results in release.

17. Furthermore, the source alleges that, under article 122 of the Code of Criminal Procedure, the indictment division must make a ruling within eight days of receipt of the application for pretrial release. If the division does not give a ruling in that time, the accused shall automatically be released by the Prosecutor General. According to the source, these actions did not yield any results and there is thus no legal basis for maintaining Mr. Ngoubou in detention.

*Arbitrary detention under category III*

18. The source maintains that the State prosecutor's indictment indicates only that Mr. Ngoubou is being prosecuted for misappropriation of public funds, which he allegedly committed while serving as a minister. According to the source, the accused was not provided with sufficient details of the charges against him and the failure to provide this information is contrary to articles 9 and 14 of the Covenant.

19. The source also alleges that principle 10 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, which provides that "procedures shall allow anyone to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty and to obtain without delay appropriate and accessible remedies", was violated in this case. Indeed, the indictment division rejected Mr. Ngoubou's appeal against the order for his pretrial detention lodged on the basis of an objection to jurisdiction on its merits without reasoning its decision. Furthermore, there has been no response to any of the requests submitted since 28 March 2017.

*Response from the Government*

20. On 15 December 2017, the Working Group transmitted the source's allegations to the Government of Gabon under its regular communications procedure. The Working Group requested the Government to provide any comments that it would like to make on the allegations contained in the communication by 14 February 2018. On 13 February 2018, the Government replied and requested that the deadline be extended by one month as of 14 February 2018. It submitted its response on 12 March 2018, which was received by the Working Group on 14 March.

21. The Government rejects the source's allegations concerning Mr. Ngoubou's situation.

22. First, the Government wishes to make it clear that Mr. Ngoubou's placement in detention was decided by order of 12 January 2017 and not 11 January, as suggested by the source. The Government does not agree with the source's allegations that the lack of information and details as to the charges against Mr. Ngoubou in the State prosecutor's indictment render the detention arbitrary. According to the Government, in accordance with criminal procedure, the indictment is not intended to expand on the charges but simply to indicate the nature of the offence and the text of the applicable law.

23. Furthermore, in relation to Mr. Ngoubou's first appearance before the court and his indictment, the Government specifies that he was properly notified of the charges against him, specifically misappropriation of public funds. The Government contests the objection to jurisdiction raised by the source and Mr. Ngoubou's lawyer, citing various decisions of the Gabonese judicial authorities. Furthermore, the Government recognizes that Mr. Ngoubou's application for pretrial release dated 31 July 2017 went unanswered, as the investigating judge did not make a ruling within eight days as required under article 3 of the Code of Criminal Procedure.

24. Lastly, with regard to Mr. Ngoubou's health, the Government stresses that he was authorized to return to prison as of 22 August 2017 after his state of health was deemed satisfactory by the doctor.

*Further information from the source*

25. The Government's response was transmitted to the source on 19 March 2018, which in turn replied on 4 April 2018. It notes that the Government's request for an extension of the deadline for submission of what were ultimately just a few unclear arguments shows the lack of interest it attaches to the issue of pretrial detention.

26. As to the arbitrary nature of the detention, the source reiterates that the indictment division had a set deadline, in accordance with article 161 (2) of the Code of Criminal Procedure, to make its ruling, in this case 22 March 2017. However, no ruling was made. Mr. Ngoubou's defence lawyer consequently sent multiple letters to the Prosecutor General and the Minister of Justice. Despite these requests, Mr. Ngoubou remains in detention.

27. Concerning the Government's argument that the indictment need only indicate the nature of the offence in question and the applicable law, the source maintains that this is not in compliance with the relevant principles and international instruments by which Gabon is bound. The source recalls that the case was referred to the investigating judge *in rem* and that it is thus not possible, on reading the indictment, to know the charges against Mr. Ngoubou. This lack of certainty makes it impossible for him to prepare his defence. The source also notes that the Government did not acknowledge in its response that, during his first appearance in court, Mr. Ngoubou did not receive any additional information on the nature, date and material elements of the offences with which he is charged. The source argues that, in the circumstances, he could not defend himself and request that the necessary steps be taken to prove his innocence and could not give the required explanations in view of the notification he received. The source also maintains that the preliminary investigation was opened on the basis of an introductory indictment and that, as the indictment division found, it is a complex case. Accordingly, it would be reasonable to assume that the prosecutor has useful information on the alleged offences committed. However, none of the offences was indicated and Mr. Ngoubou has still not been informed of them. If the charge does not include these elements, the pretrial detention is unjustified. In any case, there is a violation of the right to a defence.

28. Concerning the Government's explanation that the investigating judge rejected the objection to jurisdiction filed by the defence, a decision upheld by the indictment division, the source notes that the Government has not responded to the objections raised by the defence on this point.

29. The source also notes that the Government acknowledges that the investigating judge did not make a ruling within eight days, as provided for in article 122 (3) of the Code of Criminal Procedure. However, it does not comment on the fact that the State prosecutor did not submit the case to the investigation chamber promptly so that it could rule on the merits of the application. The source thus notes that a decision on the application for

pretrial release of 19 July 2017 was issued by order of 29 September 2017, that is, 2 months and 10 days after the application was submitted. According to the source, this delay shows the Government's lack of interest in the case. In addition, it violates article 9 (4) of the Covenant, which provides for the right to take proceedings before a court without undue delay. The source also indicates that the Prosecutor General's Office put forward an argument that is compatible with that made by the defence in the context of Mr. Ngoubou's applications for pretrial release.

**Discussion**

30. Firstly, the Working Group wishes to express its gratitude to the parties for their cooperation in the present procedure.

31. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has challenged the allegations made by the source.

32. The Working Group recalls several reports that express concern at conditions of detention, access to health care for prisoners, the excessive length of pretrial detention and the failings of the Gabonese system, particularly in Libreville Central Prison.[1] Furthermore, the Working Group notes that the use of pretrial detention by the Gabonese authorities is a systematic practice (see CAT/OP/GAB/1, para. 44).

33. In the first instance, the Working Group notes that the source contests the jurisdiction of the judge who ordered Mr. Ngoubou's pretrial detention on the basis of article 78 (5) of the Constitution. According to the source, this lack of jurisdiction of the investigating judge constitutes a violation of Mr. Ngoubou's rights that falls under category I, as there is no legal basis for his arrest and detention. Nevertheless, the source's allegations concerning the lack of jurisdiction of the court to which Mr. Ngoubou's case was referred are not compelling. After all, when considering a communication, the Working Group does not, in principle, take the place of the domestic courts. However, it must ensure that the principle by which each individual has the right to a hearing by an independent and impartial court has been respected. In the present case, the argument put forward concerning the jurisdiction of the investigating judge has no relevance under international law and the Working Group thus cannot take a decision on it.

34. However, pretrial detention remains an exception and must always be justified, taking into account the individual's specific circumstances. In the present case, the Government has not substantiated the decision to keep him in pretrial detention by providing any information showing that Mr. Ngoubou's state of health was taken into account and that none of the alternative measures to detention was appropriate. This failure to take an individualized approach and to give reasons for the pretrial detention is contrary to international human rights law and thus renders the detention arbitrary under category I.

35. Second, according to the information provided by the source, the prosecutor's indictment does not include any information on the offences with which Mr. Ngoubou is charged. He therefore does not know the charges against him. The Working Group is of the view that it cannot be concluded from the information provided by the source that notification of the offence of misappropriation of public funds[2] was not received by Mr. Ngoubou and his defence lawyer.[3] However, the Working Group considers that, in view of

[1] The Committee against Torture highlights the lack of information on the enforcement of the law adopted on 26 December 2009 that provides for improved monitoring of persons serving their sentences and better prison management (see CAT/C/GAB/CO/1, para. 17 and A/HRC/WG.6/28/GAB/2, para. 16).

[2] Gabonese Criminal Code, art. 307.

[3] The court notification and indictment issued by the State prosecutor on the day of Mr. Ngoubou's arrest and pretrial detention, respectively, and the questioning to which Mr. Ngoubou was submitted suggest that he was aware of the charges against him as of the time of his arrest.

the reliability of the allegations made by the source, neither Mr. Ngoubou nor his defence lawyer had access to sufficient information justifying his arrest and detention. In fact, this view has not been disputed by the Government, which notes in its response that, under the country's criminal procedure, the indictment is not required to provide details of the charges against the accused. However, the Working Group believes that the preliminary indictment, the purpose of which is to inform the accused, should indicate the charges and the legal categorization of the offences.

36. In fact, this view is shared by the Human Rights Committee, which states that the reasons for arrest must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint.[4] The Working Group recalls that, under the Covenant and the Universal Declaration of Human Rights, all arrested persons must be informed of the reasons for their arrest and be promptly notified of any charges against them if ordinary criminal proceedings are brought against them[5] in order to guarantee equality of arms between the parties to the proceedings.[6] In the present case, the lack of information provided in the indictment constitutes a violation of Mr. Ngoubou's right to a fair trial. It thus falls under category III, as the lack of detail means that the accused does not know all the charges against him and cannot properly prepare his defence.

37. Third, the source and the Government disagree about the circumstances surrounding Mr. Ngoubou's first appearance before the investigating judge. The source claims, without providing any supporting evidence, that he was not provided with any details and that no evidence to support the charge of misappropriation was presented. The Government contests this assertion but does not provide any evidence to the contrary. It simply states that, during his court appearance, Mr. Ngoubou was indeed informed of the charges against him. However, the evidentiary rules defined in the Working Group's jurisprudence stipulate that if the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). Thus, the fact that the Working Group is not able to fully establish the facts in the present case does not preclude it from concluding that there has been a violation of Mr. Ngoubou's right to a fair trial, falling within category III, to the extent that the Government has not provided convincing evidence to support its version of events.

38. Fourth, the source submits that there is no legal basis for Mr. Ngoubou's detention since he has remained in pretrial detention in violation of domestic law. Indeed, as the indictment division did not make a ruling on the application for Mr. Ngoubou's pretrial release within the established deadline, in accordance with article 122 of the Code of Criminal Procedure,[7] he should automatically have been released on 9 August 2017 (paras. 13 to 15 above). The Government does not deny these facts and acknowledges that the application for pretrial release went unanswered. Although the indictment division rejected the application on 29 September 2017, that ruling was made well after the established deadline. Thus, Mr. Ngoubou is still in pretrial detention in violation of domestic law, which establishes a maximum duration of pretrial detention of one year, and article 9 (3) of

[4] General comment No. 35 (2014) on article 9 (Liberty and security of person), para. 25.

[5] Ibid., para. 24.

[6] Rule 119 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules);

[7] Under article 122 of the Gabonese Code of Criminal Procedure, all accused persons who have applied to the investigating judge under article 121 have the right to apply directly to the indictment division if the investigating judge does not respond within the established deadline. The indictment division then has eight days as of the date of receipt of the application to make a ruling on the application for release. If it does not make a ruling by that deadline, the individual must automatically be released.

the Covenant, which requires the accused to be brought promptly before a judge.[8] The law guarantees the right to be tried within a reasonable time or to be released.[9]

39. The Working Group recalls that pretrial detention is not the rule and should not be a systematic practice in Gabon (see CAT/OP/GAB/1, para. 44). It notes that the Human Rights Committee has explained that an important element of a fair trial is its expeditiousness and that, in cases in which the court refuses the accused release on bail, he or she must be tried as quickly as possible. The Committee has also recalled that the detention of defendants awaiting trial should not be the general practice, as pretrial detention must be based on an individualized determination that it is reasonable and necessary.[10]

40. Consequently, the fact that Mr. Ngoubou has been in pretrial detention since 2017, during which time the trial has not begun and there has been no individualized evaluation of the appropriateness of his detention, leads to the conclusion that his rights have been violated.[11] However, this violation does not fall under category I owing to a lack of legal basis, as claimed by the source, but under category III, as it is a violation of the right to an effective remedy.

41. Fifth, the source notes that, because of his state of health, Mr. Ngoubou requires ongoing care in a specialized centre and regular monitoring. In view of the prison conditions and practices in Gabon (see CAT/OP/GAB/1, para. 87 et seq.), the Working Group is particularly concerned at Mr. Ngoubou's lack of access to care during his detention at Libreville Central Prison. The Government claims, on the contrary, that Mr. Ngoubou has received care since 2 August 2017. He was transferred to a military hospital, where he stayed until 22 August 2017, when his state of health was declared satisfactory, according to the medical documents submitted by the Government.

42. The Working Group recalls that when prison conditions are so poor as to weaken a person in pretrial detention and, consequently, reduce equality of opportunity, a fair trial is no longer guaranteed, even if procedural guarantees are otherwise rigorously respected.[12] Although the medical certificates state that Mr. Ngoubou's state of health is satisfactory, the Working Group has serious reason to be concerned that the conditions of Mr. Ngoubou's pretrial detention have affected his capacity to defend himself and are in violation of article 10 of the Covenant, articles 4 and 5 of the African Charter on Human and Peoples' Rights and rules 24 and 25 of the Nelson Mandela Rules.

43. In view of the foregoing, the Working Group considers that the failure to meet the obligation to provide specific information concerning the charges against Mr. Ngoubou and the violations of the right to an effective remedy, provided for in article 2 (3) of the Covenant and article 8 of the Universal Declaration of Human Rights, of the rights to be tried in a reasonable time, to equality of arms,[13] to liberty pending trial and to a defence and the obligation on judges to give reasoned decisions, in the light of article 11 of the Universal Declaration of Human Rights, constitute a broader violation of the right to a fair trial under article 14 of the Covenant and article 10 of the Universal Declaration of Human Rights.

---

[8] Article 117 of the Code of Criminal Procedure provides that, in criminal cases, the maximum duration of detention is 1 year.

[9] International Covenant on Civil and Political Rights, arts. 19 (3) and 14 (3); Universal Declaration of Human Rights, art. 9; African Charter on Human and Peoples' Rights, art. 7 (1); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 38.

[10] General comment No. 35, para. 29.

[11] See opinion No. 34/2017, paras. 40–42.

[12] See Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 69.

[13] See the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, guideline 5.

44. The Working Group finds that the source's claims raise many other violations of the right to a fair trial, in particular the right to receive visits from relatives[14] and the right to access to a lawyer.[15]

45. Taken together, all of these violations of the right to a fair trial are sufficiently serious for the Working Group to conclude that Mr. Ngoubou's detention is arbitrary under category III.

**Disposition**

46. In light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Mr. Ngoubou, being in contravention of articles 8, 9, 10 and 11 of the Universal Declaration of Human Rights and of articles 2, 9, 10 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

47. The Working Group requests the Government of Gabon to take the steps necessary to remedy the situation of Mr. Ngoubou without delay and bring it into conformity with the relevant international norms, including those set out in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

48. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Ngoubou immediately and accord him an enforceable right to reparation, including compensation and a guarantee of non-repetition, in accordance with international law, and to provide him with medical care as needed and appropriate for his condition.

49. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Ngoubou and to take appropriate measures against those responsible for the violation of their rights.

**Follow-up procedure**

50. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Ngoubou has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Ngoubou;

(c) Whether an investigation has been conducted into the violation of Mr. Ngoubou's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Gabon with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

51. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

52. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the

[14] Rules 43, 58 and 106 of the Nelson Mandela Rules; principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;

[15] See the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principles 9 and 10.

opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

53. The Government should disseminate through all available means the present opinion among all stakeholders.

54. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[16]

[*Adopted on 23 April 2018*]

[16] See Human Rights Council resolution 33/30, paras. 3 and 7.

United Nations A/HRC/WGAD/2018/26

General Assembly

Distr.: General
2 July 2018

Original: English

**Human Rights Council**
**Working Group on Arbitrary Detention**

# Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

## Opinion No. 26/2018 concerning Ola Yusuf al-Qaradawi and Hosam al-Din Khalaf (Egypt)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 16 January 2018 the Working Group transmitted to the Government of Egypt a communication concerning Ola Yusuf al-Qaradawi and Hosam al-Din Khalaf. The Government replied to the communication on 27 March 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

GE.18-10841(E)

*1810841*

Please recycle

**Submissions**

*Communication from the source*

5. Ola Yusuf al-Qaradawi, age 56, is a Qatari citizen of Egyptian origin and Hosam al-Din Khalaf, age 58, is an Egyptian citizen. They are also legal permanent residents of the United States of America and have several immediate family members who are citizens of the United States. They are a married couple and have three children. Ms. al-Qaradawi is the daughter of well-known Islamic scholar, Sheikh Yusuf al-Qaradawi, and previously was an administrative employee at the Embassy of Qatar in Egypt. Mr. Khalaf is an engineer who worked in the construction business and was previously a volunteer administrator for the Al-Wasat party, an Islamic political party that remains legal in Egypt. Reportedly, Mr. Khalaf had been previously detained in Egypt from 2014 to 2016 on the unofficial accusation of being part of the Muslim Brotherhood, which he had strongly denied. He was later released without charge or trial.

*Arrest and detention*

5. According to the source, Ms. al-Qaradawi and Mr. Khalaf were arrested on 30 June 2017, by agents from the Burg al-Arab Division of the State security agency, a branch of the Ministry of the Interior, at the family's vacation home in Ramses Village, Alexandria, on the north coast of Egypt. The source states that no arrest warrant was presented and no search warrant for the home was provided. The couple later learned that the agents had detained them for questioning in relation to a violation of an asset freeze, because they were moving furniture out of their vacation home. According to the source, the agents claimed that the home belonged to Ms. al-Qaradawi's father, Sheikh Yusuf al-Qaradawi, but in fact he did not own the home.

6. On 2 July 2017, Ms. al-Qaradawi and Mr. Khalaf were brought to the prosecutor's office of the State security agency, where they were informally told that they were under investigation. They were also told that they had been added to Case No. 316, a pre-existing mass investigation that appears to include over 250 people and involves vague allegations related to terrorism. However, they were not informed of any specific allegations against them.

7. After that meeting, Ms. al-Qaradawi and Mr. Khalaf were reportedly transported to prisons near Cairo that are under the control of the Ministry of the Interior. Ms. al-Qaradawi was taken to Al-Qanater prison and Mr. Khalaf was taken to Tora prison. The source informs the Working Group that, as they have not been charged with any crime, Ms. al-Qaradawi and Mr. Khalaf are currently being detained pursuant to temporary orders, which purport to authorize their detention.

8. On 3 July 2017, State-run media in Egypt reported that Ms. Al-Qaradawi and Mr. Khalaf had been arrested on the basis of allegations of being members of the Muslim Brotherhood and harming national unity and peace. The source emphasizes that both deny these unofficial allegations and that if Mr. Khalaf had any connection to the Muslim Brotherhood he would likely have faced charges during his prior detention, which was based on a similar accusation.

9. On 17 August 2017, the media reported that the couple's assets, along with those of five of Ms. al-Qaradawi's siblings, had been frozen, on the basis of allegations of affiliation with the Muslim Brotherhood and terrorist activities. The source emphasizes that the tactic of freezing assets has been used regularly by the Government against thousands of Egyptians over the past several years. The source asserts that, in the present case, this has led to Ms. al-Qaradawi and Mr. Khalaf being viewed as guilty by association without any evidence having been presented or any opportunity given to them to refute the allegations.

10. Despite various reports published by State-run media about charges allegedly having been filed against the couple, no copy of any arrest warrant, search warrant or indictment has been provided to Ms. al-Qaradawi, Mr. Khalaf or their lawyers.

11. According to the source, under Egyptian law, State security prosecutors may order 15 days of preventative detention for individuals suspected of committing felonies. This

period of detention can be renewed by the prosecutor for up to five months, in 15-day increments. To hold the individual past the five months, the prosecutor must submit the case to a relevant judge, who can either release the accused or renew the detention period for up to 45 days at a time.

12. The source informs the Working Group that Ms. al-Qaradawi and Mr. Khalaf had their temporary detention orders renewed nine times before being brought before a judge. During each of the brief renewal meetings, they were both able to speak with their lawyers, but not in private, for two to three minutes, which is how the conditions of their detention are known.

13. On 26 November 2017, Ms. al-Qaradawi and Mr. Khalaf were presented to a judge in Cairo Criminal Court who, under Egyptian law, will now see them every 45 days to renew their detention. They were reportedly held in glass cages during their brief appearances before the court and denied the ability to consult counsel.

14. On 4 January 2018, the judge renewed Ms. al-Qaradawi's detention order for a second 45-day period. On 8 January 2018, he renewed Mr. Khalaf's detention order for a second 45-day period. The source notes that a United States consular official who sought to observe both of these sessions was denied access to the courtroom.

*Conditions of detention*

15. The source alleges that, while they have been held in detention for more than six months, Ms. al-Qaradawi and Mr. Khalaf, in violation of Egyptian laws and regulations and international law, have consistently been denied their right to have contact with their family and access to counsel, and have been subjected to cruel, inhuman or degrading treatment that may amount to torture. Both have been held in incommunicado solitary confinement 24 hours per day, and allowed only five minutes per day to go to the bathroom. Their cells are dark, small, lack natural light and ventilation and have no beds or toilets. Unlike other prisoners, they are not permitted to regularly purchase food and water from the canteen or receive food and clothing from their family.

16. According to the source, Ms. al-Qaradawi, in particular, seems to have been singled out for disparate treatment. While her family has tried to visit her several times, they were, every time, the only ones to be turned away and were told that she was not eligible for family visits. Ms. al-Qaradawi was also denied consular visits from Qatari officials. According to her lawyers, who have seen her only briefly during the detention renewal sessions, Ms. al-Qaradawi has lost a significant amount of weight and appears very weak. She became very ill and was brought to the prison clinic but it is unclear whether she received any medication or treatment. In addition, during the renewal of her detention on 4 January 2018, Ms. al-Qaradawi had only about two minutes to speak with her counsel. The source alleges that she has suffered serious physical abuse in the prison. The source notes that, apparently, the guards sometimes use prisoners to cover their shifts watching the cells. On several occasions, one prisoner, who has been detained for four years and appears mentally unstable, has hit Ms. al-Qaradawi, pushed her to the ground and handled her aggressively. Ms. al-Qaradawi's repeated complaints to prison authorities have reportedly been ignored.

17. Mr. Khalaf, who is being held in Tora prison, one of the most notorious prisons in Egypt, has been denied access to see a doctor for reported pain in his eyes. A second request for a medical check-up was submitted to the prosecution but, reportedly, no action has been taken thus far.

18. The source reports that, as a result of these conditions, Ms. al-Qaradawi and Mr. Khalaf are suffering severe mental and emotional stress. The extent of their suffering is, however, unknown as they are not permitted any contact with the outside world. Their respective ages, 56 and 58 years old, make Ms. al-Qaradawi and Mr. Khalaf particularly vulnerable to cruel, inhuman and degrading treatment and torture. The source notes that, without intervention, it is unclear how much longer they will be able to withstand the physical and psychological distress imposed by prison authorities.

19. The source emphasizes that the general situation for human rights in Egypt is dire, noting independent reports that in the country there may be tens of thousands of arbitrarily detained people, who are often subjected to years of pretrial detention with no charges or trial and under harsh prison conditions. The source claims that the Government has a well-documented practice of arresting real or purported political opponents and refusing them access to lawyers and family and to evidence that could be challenged in a court.

*Analysis of violations*

20. In the light of the foregoing, the source submits that Ms. al-Qaradawi and Mr. Khalaf have been denied fair trial guarantees and that their deprivation of liberty is arbitrary under category III of the categories applied by the Working Group.

*Arrest without a warrant*

21. According to the source, under the Egyptian Constitution, citizens can be arrested only on the basis of a judicial warrant, except in extreme cases. However, according to the source, Ms. al-Qaradawi and Mr. Khalaf were not arrested pursuant to an arrest warrant. When the State security agents arrived at the vacation home on 30 June 2017, they did not show any type of warrant, nor did they inform the couple that they were under arrest. Similarly, the search of the vacation home was illegal, as Egyptian law requires that authorities have a valid and specific search warrant to enter private property. The agents did not show any search warrant before they searched the vacation home or the couple's permanent residence in Cairo and seized personal property.

*No reason given for arrest and no formal charges laid*

22. The source reports that, since their arrest on 30 June 2017, Ms. al-Qaradawi and Mr. Khalaf have not been formally charged with any crime. At the time of the arrest, no reason for the arrest was given to Ms. al-Qaradawi, Mr. Khalaf, their family or their lawyers. To date they have not received any official explanation for their arrest and continued detention.

23. Ms. al-Qaradawi and Mr. Khalaf's lawyers have been told informally that the couple were suspected of "terrorist" activities. However, the source asserts that this claim is patently false and runs counter to the original reason given for their detention, which was the removal of furniture that Egyptian authorities believed was a violation of the asset freeze that had been imposed on the father of Ms. al-Qaradawi.

24. The source emphasizes that, though public media reports state that Ms. al-Qaradawi and Mr. Khalaf have been charged, neither they nor their lawyers have ever been presented with even a single paper in writing asserting what they are suspected of doing, let alone that they have been charged with a crime.

*Extended pretrial detention*

25. The source submits that for almost five months Ms. al-Qaradawi and Mr. Khalaf have been held in pretrial detention pursuant to multiple 15-day temporary detention orders, which were issued by the prosecutor and not by a judge. They have not been given any reason justifying their ongoing pretrial detention, or any opportunity to meaningfully contest the detention. While their lawyers have attempted to challenge their detention, all requests have been summarily denied. As such, Ms. al-Qaradawi and Mr. Khalaf have not been afforded any opportunity for conditional release, and are therefore being detained in violation of the international law, which bars preventative detention except in exceptional circumstances.

*Incommunicado detention*

26. The source submits that Ms. al-Qaradawi and Mr. Khalaf have been detained incommunicado since 30 June 2017. There are brief moments every 15 days, when their detention orders have been renewed, when they see their counsel, but otherwise they are totally cut off from the outside world.

27. For the first two days of their detention, their whereabouts were reportedly completely unknown to their family and lawyers. Since their detention in Al-Qanater and Tora prisons — as of 2 July 2017 — they have been held in ongoing solitary confinement and thus prohibited from communicating with their family. No visits or phone calls have been permitted.

*Lack of access to legal counsel*

28. When Ms. al-Qaradawi and Mr. Khalaf were arrested and initially questioned by the State security agents, their lawyers were not informed and were therefore not present, which is in direct violation of the Egyptian Constitution. As their detention continues, they have been denied all visits with their lawyers outside of the brief contact during the detention renewal sessions. At the sessions, Ms. al-Qaradawi and Mr. Khalaf cannot discuss any details of their case. Any conversations they have are in the presence of the State security prosecutor and are therefore not confidential.

*Denial of access to all information*

29. Ms. al-Qaradawi, Mr. Khalaf and their counsel have seen no official documents or evidence from the Government of Egypt explaining the reasons for the couple's arrest and detention, or any formal charges against them. As such, Ms. al-Qaradawi and Mr. Khalaf are completely unable to meaningfully challenge their ongoing temporary detention, and are unable to even contemplate preparing a defence to any potential charges that may be levelled against them.

*Denial of the presumption of innocence*

30. The source notes that the right to the presumption of innocence is protected in the Constitution of 2014, which explicitly states in article 96 that an accused person is innocent until proven guilty in a fair court of law that provides guarantees for the person to defend himself.

31. Since the arrests, fabricated statements about the couple's case, inter alia, those labelling them as members of the Muslim Brotherhood and as terrorists, have been made public through the State-run media. Ms. al-Qaradawi and Mr. Khalaf have not been provided with any opportunity to refute the informal claims. As such, they have effectively been tried in the court of public opinion without being charged with any crime.

*Joint communications by special procedures mandate holders*

32. Ms. al-Qaradawi and Mr. Khalaf have previously been the subject of a joint urgent appeal (EGY 15/2017) issued on 12 October 2017 by the Working Group on Arbitrary Detention, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. The Working Group acknowledges the reply from the Government of Egypt, received on 21 December 2017.

*Response from the Government*

33. On 16 January 2018, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting the Government to provide detailed information by 18 March 2018 concerning the current situation of Ms. al-Qaradawi and Mr. Khalaf and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying their continued detention and to provide details regarding the conformity of the relevant legal provisions and proceedings with international law, in particular the norms of international human rights law, that bind Egypt. Moreover, the Working Group called upon the Government to ensure Ms. al-Qaradawi and Mr. Khalaf's physical and mental integrity.

34. On 8 March 2018, the Government sought an extension of the deadline to submit its response. In conformity with paragraph 16 of its methods of work, the Working Group granted an extension for the Government to submit its response by 2 April 2018. The Government submitted its response to the regular communication on 27 March 2018.

35. First, the Government notes that it is a party to several international treaties on human rights, including:

(a) The International Covenant on Civil and Political Rights, ratified by Egypt in 1982;

(b) The Convention on the Elimination of All Forms of Discrimination against Women, ratified by Egypt in 1982;

(c) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, acceded to by Egypt in 1986;

(d) The Convention on the Rights of the Child, ratified by Egypt in 1990.

36. According to the Government, the Constitution affirms a number of rights and responsibilities, including those set out in human rights frameworks at the local and international levels, that must be respected, including: the rights to dignity, to personal liberty and to physical integrity, the independence of the judiciary, freedom of opinion and the right to fair and impartial trials, as detailed in articles 52, 65, 86 and 94 to 100 of the Constitution. The Government states that these rights represent a symbol of democracy and are essential to ensuring full respect for human rights. They are also directly linked to the response to the incorrectness of the allegations contained in the complaint.

37. The Government alleges that Ms. al-Qaradawi and Mr. Khalaf's case was based on an investigation undertaken by the Homeland Security Agency as recorded in the minutes of meetings, held on 19 and 26 February 2017, 4 April 2017, 13 and 25 May 2017 and 29 June 2017, on the plot by the senior leaders of the Muslim Brotherhood, including Mahmoud Ezzat Ibrahim Eissa (Supreme Guide) and Ahmed Ibrahim Munir Mustafa (Deputy Supreme Guide), to create an armed wing to conduct hostile operations aimed at the overthrow of the Government and to coordinate with Ansar Bait al-Maqdis (Supporters of the Holy House) to target Christians.

38. The Government further alleges that Qatar has backed the conspiracy, providing monthly payments of more than $30 million, with the accused Yusuf Abdullah Ali al-Qaradawi acting as the go-between. It alleges that Turkey also provided financial support, with the accused Hussein Mahmoud al-Qazzaz in charge of coordination. The Government states that Mohamed Kamal, a senior leader killed by the security forces in October 2016, was responsible for the creation of armed groups whose members would receive military training abroad.

39. According to the Government, Ola Yusuf al-Qaradawi and Hosam al-Din Khalaf were tasked with delivering instructions from exiled Muslim Brotherhood leaders in Qatar to their colleagues in Egypt, taking advantage of their position in the Qatari embassy in Egypt. The Government states that Ms. al-Qaradawi used the vacation home in Ramses Village to hold organizational meetings with Muslim Brotherhood leaders to deliver assignments and hand over money, and that the couple kept documents and money in the vacation home and used a car registered by Mr. Khalaf for the works of the Muslim Brotherhood.

40. The Government states that Ms. al-Qaradawi and Mr. Khalaf were arrested and their residence searched on 1 July 2017 in accordance with the seizure and inspection order issued by the public prosecution on 30 June 2017, as detailed in case No. 316 of 2017. They were charged with being members of an illegal terrorist group aimed at disrupting the Constitution and the law; preventing the State organs and public authorities from executing their tasks; attacking public and private rights and freedoms; harming national unity and social peace by means of terrorism; and knowingly providing material aid to a terrorist group through financial support. The public prosecution initially issued a decision to imprison them for 15 days pending investigation, and as at the time of writing they remained in custody.

41. The Government maintains that the health rights of persons deprived of their liberty are protected by articles 33 to 37 of Law No. 396 of 1956 concerning the organization of prisons. All prisons are required to have at least one resident physician for the care of the

inmates. The prisoners who cannot be treated in the prison or who are in critical condition may be transferred to an outside hospital.

42. According to the Government, Ms. al-Qaradawi, who is being held in the women's section of Al-Qanater prison, was examined by the prison's doctor, who reported that she did not have any health issues, and she regularly visits the prison cafeteria, where she spent 600 Egyptian pounds in October. Mr. Khalaf, who is being held in maximum-security prison No. 2 in Tora, also received a medical examination, which revealed that he was suffering from early symptoms of cataracts and posterior vitreous detachment. He received appropriate treatment from the prison medical staff and regularly visits the prison cafeteria, where he spent 2,000 Egyptian pounds in October. The prison records indicate that neither have received any visits from their family members since the beginning of their custody.

43. It is the Government's view that Ms. al-Qaradawi and Mr. Khalaf have received due care under the Law concerning the organization of prisons and the prison regulations, in compliance with article 12 of the International Covenant on Economic, Social and Cultural Rights. The Government submits that the allegations made by the source are groundless.

44. Furthermore, the Government contends that the Egyptian legal system affords sufficient safeguards to those deprived of their liberty in conformity with international standards, including article 9 of the International Covenant on Civil and Political Rights. Articles 54 to 56 of the Constitution provide for appropriate guarantees; articles 85 and 86 of the Law concerning the organization of prisons allow judicial supervision of prisons. It is impossible to state that the conditions of the detainees are poor and that proper living and health conditions are not provided since the law empowers the judicial authority to take the steps it deems appropriate to maintain all forms of legal detention.

45. The Government concludes that all actions taken with regard to Ms. al-Qaradawi and Mr. Khalaf were in accordance with international standards, the Constitution and domestic laws. The source's allegations are without legal or factual grounds.

*Further comments from the source*

46. The response from the Government was transmitted to the source on 27 March 2018 for further comment. In its response of 9 April 2018, the source maintains that Ms. al-Qaradawi and Mr. Khalaf's arrest and ongoing detention are arbitrary and in violation of international law, notwithstanding the Government's claims to the contrary. The source observes that almost half of the Government's response discusses unrelated accusations against senior members of the Muslim Brotherhood, including Ms. al-Qaradawi's father, Sheikh Yusuf al-Qaradawi, ascribing guilt by association to Ms. al-Qaradawi and Mr. Khalaf, and that the Government repeatedly tries to counter specific allegations in the initial communication with general denials by merely quoting articles of international and domestic human rights law.

47. The source provides further information to support its allegations that Ms. al-Qaradawi and Mr. Khalaf's detention falls under category III for violating their due process rights by reason of: (a) arrest without a warrant; (b) failure to provide a reason for arrest and holding without charge; (c) subjection to extended pretrial detention; (d) incommunicado detention; (e) denial of access to legal counsel; (f) denial of all access to information; and (g) violation of the right to the presumption of innocence. The source states that, while Qatar does not currently have an embassy operating in Egypt, the rights and interests of its citizens are represented by the embassy of Oman, which has made numerous requests for visits, transfers, improvement of detention conditions, release and more information only to face categorical denial.

48. The source also reinforces its claims that the conditions of detention amount to cruel, inhuman and degrading treatment on the basis of: (a) abuse and mistreatment with impunity; (b) denial of appropriate medical care; and (c) prolonged solitary confinement.

**Discussion**

49. The Working Group thanks the source and the Government for their extensive engagement and for their submissions in relation to Ms. al-Qaradawi and Mr. Khalaf's detention.

50. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.[1]

51. The Working Group recalls that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden of proof should rest with the public authority, because the latter is in a better position to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law.[2]

52. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international or regional instruments.[3] Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.[4] The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[5]

*Category I*

53. The Working Group will consider whether there have been violations under category I, which concerns deprivation of liberty without invoking any legal basis.

54. According to the information provided by the source, which the Government has failed to rebut with credible evidence, Ms. al-Qaradawi and Mr. Khalaf were arrested without the presentation of warrant. In principle, arrest without a valid warrant must be considered ipso facto a violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the International Covenant on Civil and Political Rights due to the lack of legal basis.

55. The alleged legal basis for Ms. al-Qaradawi and Mr. Khalaf's arrest and detention further suffers from other serious defects. As stated in the Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, deprivation of liberty is regarded as unlawful when it is not on such grounds and in accordance with procedures established by law.[6] In order to ascertain such a legal basis, the authorities should have informed Ms. al-Qaradawi and Mr. Khalaf of the reasons for their arrest or the charges against them at the time of their arrest; their failure to do so violates article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant.

---

[1] See A/HRC/19/57, para. 68.

[2] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, para. 55; and opinions No. 41/2013, para. 27; and No. 59/2016, para. 61.

[3] See General Assembly resolution 72/180, preambular para. 5; Commission on Human Rights resolutions 1991/42, para. 2 and 1997/50, para. 15 and Human Rights Council resolutions 6/4, para. 1 (a) and 10/9.

[4] See opinions No. 94/2017, para. 47; No. 76/2017, para. 49; No. 1/2003, para. 17; No. 5/1999, para. 15; and No. 1/1998, para. 13.

[5] See opinions No. 94/2017, para. 48; No. 88/2017, para. 24; No. 83/2017, para. 60; No. 76/2017, para. 50; and No. 33/2015, para. 80.

[6] See A/HRC/30/37, para. 12.

56. The Working Group notes that the Government has failed to specify when Ms. al-Qaradawi and Mr. Khalaf were allowed to contact or receive their family, lawyers or consular officials or to provide documentary evidence, such as a copy of the arrest warrants and visitation logs or phone registries to prove any contact that has been made with either of them since their arrest on 30 June 2017. It also notes that Ms. al-Qaradawi and Mr. Khalaf were not brought promptly before a judge or afforded the right to take proceedings before a court so that it may decide without delay on the lawfulness of their detention in accordance with article 9 (3) and (4) of the Covenant. This also deprived them of an effective judicial remedy for the violation of their rights and freedoms as provided for in articles 8 and 10 of the Universal Declaration and articles 2 (3) and 14 (1) of the Covenant.

57. The Working Group expresses its grave concern that Ms. al-Qaradawi and Mr. Khalaf have been held in incommunicado detention, have been denied access to a lawyer, to medical care and to medication and have been subjected to forced sleep deprivation. The Working Group, in its jurisprudence, has consistently argued that holding a person incommunicado breaches the right to challenge the lawfulness of detention before a judge.[7] Articles 8, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights also confirm the impermissibility of incommunicado detention.

58. The Working Group notes, in this regard, that the Committee against Torture has made it clear that incommunicado detention creates conditions that lead to violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[8] The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also consistently urged States to declare incommunicado detention illegal.[9] The beatings and denial of access to medical care and medication endured by Ms. al-Qaradawi and Mr. Khalaf appear to confirm the worst fears about incommunicado detention. Arrestees or detainees who have been beaten and are not provided the minimum conditions to maintain their health, in violation of articles 5 and 25 (1) of the Universal Declaration of Human Rights and articles 7 and 10 of the International Covenant on Civil and Political Rights, will find it difficult to take proper judicial proceedings to challenge the lawfulness of their detention.

59. The Working Group therefore considers that Ms. al-Qaradawi and Mr. Khalaf's arrest, detention and imprisonment lack a legal basis and are thus arbitrary, falling under category I.

*Category III*

60. The Working Group will now consider whether the violations of the right to a fair trial and due process suffered by Ms. al-Qaradawi and Mr. Khalaf were of such gravity as to give their deprivation of liberty an arbitrary character with respect to category III.

61. According to the information provided by the source, which the Government has failed to rebut with credible evidence, Ms. al-Qaradawi and Mr. Khalaf were arrested without the presentation of warrant and were not promptly informed of the reasons for their arrest or of any charges against them. While the Government states that Ms. al-Qaradawi and Mr. Khalaf were arrested in accordance with the law and due process and that its laws provide for legal guarantees and judicial supervision in accordance with international standards, it has failed to specify when Ms. al-Qaradawi and Mr. Khalaf were allowed to contact or receive their family, lawyers or consular officials or to provide documentary evidence such as a copy of the arrest warrant and visitation logs or phone registries to prove any contact that has been made with either of them since their arrest on 30 June 2017.

62. The Working Group notes that temporary detention orders are not so "temporary" when they are renewed automatically and indefinitely. While the reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case,

[7] See opinion No. 93/2017, para. 49.

[8] See A/54/44, para. 182 (a).

[9] See A/54/426, para. 42 and A/HRC/13/39/Add.5, para. 156.

taking into account the complexity of the case, in this instance the Government failed to provide, on the basis of the principles of legitimacy, necessity and proportionality, any justification for Ms. al-Qaradawi and Mr. Khalaf's pretrial detention, which has already lasted almost 10 months with no sign that their criminal trial will take place soon. In the present case, the Working Group finds that the Government neither tried Ms. al-Qaradawi and Mr. Khalaf within a reasonable time nor released them, in violation of article 11 (1) of the Universal Declaration of Human Rights and articles 9 (3) and 14 (3) (c) of the International Covenant on Civil and Political Rights.

63. Furthermore, the Government did not respect Ms. al-Qaradawi and Mr. Khalaf's right to legal assistance at all times — which is inherent in the right to liberty and security of person — or their right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3 and 9 of the Universal Declaration of Human Rights and articles 9 (1) and 14 (1) of the Covenant. Ms. al-Qaradawi and Mr. Khalaf were able to speak with their lawyer for two to three minutes each time, but not in private, when they were brought before a judge for the renewal of their temporary detention orders.

64. The Government further failed to respect Ms. al-Qaradawi and Mr. Khalaf's presumption of innocence, in violation of article 11 (1) of the Universal Declaration of Human Rights, articles 10 (1) and 14 (2) of the Covenant, and principle 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In broadcasting in the State media statements labelling them as members of the Muslim Brotherhood and as terrorists before they had even been formally charged or tried, when they had no chance to refute such informal claims, the Government violated Ms. al-Qaradawi and Mr. Khalaf's right to be presumed innocent. The Working Group recalls that all public officials have a duty to refrain from prejudging the outcome of a trial, for example by abstaining from making public statements affirming the guilt of the accused.[10] While the presumption of innocence needs to be balanced with the public's right to know in a democratic society, the latter must be proportionate to the former. Furthermore, the near-automatic extension of Ms. al-Qaradawi and Mr. Khalaf's pretrial detention by courts with no regard for their due process and fair trial rights are also indicative of the violation of the presumption of innocence.

65. Ms. al-Qaradawi and Mr. Khalaf's ordeals in prison amounted to cruel, inhuman and degrading treatment, in violation of article 5 of the Universal Declaration of Human Rights, articles 7 and 10 of the Covenant and principle 6 of the Body of Principles, in addition to the relevant provisions of the Convention against Torture.[11] Such a situation would seriously undermine their ability to defend themselves and hinder their exercise of the right to a fair trial.

66. Furthermore, the Working Group refers to rule 45 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), which stipulates that solitary confinement is to be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. Rule 44 describes prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days. The Human Rights Committee has noted that prolonged solitary confinement of a detained or imprisoned person may amount to acts prohibited by article 7.[12]

---

[10] See opinions No. 83/2017, para. 79; and No. 33/2017, para. 86 (e). See also Human Rights Committee general comment No. 35 (2014) on liberty and security of person, para. 30 and *Gridin v. Russian Federation* (CCPR/C/69/D/770/1997), paras. 3.5 and 8.3.

[11] See also article 13 of the Arab Charter on Human Rights and article 5 of the African Charter on Human and Peoples' Rights.

[12] See the Committee's general comment No. 20 (1992) on prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 6.

*Right to consular assistance*

67. The Working Group notes that, vis-à-vis Ms. al-Qaradawi, the Government failed to take the formal procedures necessary to establish the legal basis for the arrest and detention of a foreign national under the provisions of article 16 (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and article 36 of the Vienna Convention on Consular Relations, to which Egypt is a party.

68. According to article 16 (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, when a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner: (a) the consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State is to, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor; (b) the person concerned is to have the right to communicate with the said authorities and any communication by the person to the said authorities is to be forwarded without delay, and he or she is to also have the right to receive communications sent by the said authorities without delay; (c) the person concerned is to be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

69. Article 36 (1) (b) of the Vienna Convention on Consular Relations provides that a foreign national arrested or committed to prison or to custody pending trial or is detained in any other manner should be informed without delay of his or her rights to inform consular officers about his or her detention and to have any communication addressed to them forwarded without delay. This is in addition to the consular officers' right to be informed of the detention and to maintain communication (art. 36 (1) (b)) and their right to arrange for legal representation and to visit in person (art. 36 (1) (c)).

70. The Working Group notes that the General Assembly has reaffirmed emphatically the duty of States parties to ensure full respect for and observance of the Vienna Convention on Consular Relations, in particular with regard to the right of all foreign nationals, regardless of their migration status, to communicate with a consular official of the sending State in case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform the foreign national without delay of his or her rights under the Convention.[13]

71. Furthermore, the Body of Principles recognizes in principle 16 (2) the importance of consular assistance for a detained or imprisoned foreign national by specifically mentioning his or her right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he or she is a national.

72. The Nelson Mandela Rules provide, in rule 62, paragraph 1, that prisoners who are foreign nationals are to be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.[14]

73. Given the limited availability of remedies for individuals in the international sphere, consular protection is invaluable for foreign nationals who are disadvantaged by the lack of familiarity with the local law, customs and even language. Furthermore, it should be noted that the institution of consular protection not only serves the interests of the detained foreign individual and of the State that espouses such interests, but also furthers the interests of the international community as a whole by facilitating international exchange and reducing the potential for friction between States over the treatment of their nationals.[15]

---

[13] See General Assembly resolution 72/179, para. 32. See also General Assembly resolutions 72/149, para. 4 (k) and 72/188, para. 15 (g) and Human Rights Council resolution 37/28, para. 2 (j).

[14] See also A/HRC/30/37, annex, guideline 21, stipulating the monitoring of all places of immigration detention and public reporting by consular officials (conditional upon request by persons in immigration detention).

[15] See opinion No. 58/2017, para. 64.

74. In the light of the factual and legal considerations above, the Working Group considers that the Government has failed to respect Ms. al-Qaradawi's right to consular protection under customary international law, as codified in article 16 (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and article 36 of the Vienna Convention on Consular Relations, during her initial arrest and detention, in violation of article 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights and principle 16 (2) of the Body of Principles.

75. In the light of the foregoing, the Working Group concludes that the non-observance of the international norms relating to the right to a fair trial is of such gravity as to give Ms. al-Qaradawi and Mr. Khalaf's deprivation of liberty an arbitrary character, falling under category III.

*Category V*

76. The Working Group will now examine whether Ms. al-Qaradawi and Mr. Khalaf's deprivation of liberty constitutes discrimination under international law with respect to category V.

77. The source maintains that Ms. al-Qaradawi and Mr. Khalaf have been targeted by the Government for guilt by association as the daughter and son-in-law of Sheikh Yusuf al-Qaradawi, a prominent figure of the Muslim Brotherhood based in Qatar. The Government initially claimed that Ms. al-Qaradawi and Mr. Khalaf had been arrested for violating the asset freeze imposed on Sheikh Yusuf al-Qaradawi before levelling more substantial allegations against them that the asset in question, the vacation home in Ramses Village, served as the meeting place for their father's compatriots.

78. While the Government claims that Ms. al-Qaradawi and Mr. Khalaf were arrested and charged for membership of an illegal terrorist group, it has offered few details other than making vague assertions that their home served as the hideout for the Muslim Brotherhood. Nor have the two been formally charged or tried for their alleged crime.

79. The Working Group cannot but conclude that Ms. al-Qaradawi and Mr. Khalaf have been arrested and detained for their family ties with Sheikh Yusuf al-Qaradawi. This is the only plausible explanation for the subversion of the equal protection of the law they experienced, as observed above. No one should be deprived of liberty for the crimes, real or not, committed by their family member by birth or marriage in a free, democratic society.

80. For these reasons, the Working Group considers that Ms. al-Qaradawi and Mr. Khalaf's deprivation of liberty constitutes a violation of article 2 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the International Covenant on Civil and Political Rights on the grounds of discrimination based on birth and family relations aimed at and resulting in ignoring the equality of human beings and that it therefore falls under category V.

81. This case is one of several cases brought before the Working Group in the past five years concerning the arbitrary deprivation of liberty of persons in Egypt.[16] The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.[17]

**Disposition**

82. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Ola Yusuf al-Qaradawi and Hosam al-Din Khalaf, being in contravention of articles 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and

[16] See, for example, opinions No. 83/2017, No. 78/2017, 30/2017, No. 60/2016, No. 54/2016, No. 42/2016, No. 41/2016, No. 7/2016 and No. 6/2016.

[17] See, for example, opinions No. 32/2017, para. 40; No. 33/2017, para. 102; No. 51/2017, para. 57; No. 56/2017, para. 72; No. 78/2017, para. 86; and No. 83/2017, para. 89.

25 of the Universal Declaration of Human Rights, of articles 2, 7, 9, 10, 12, 14, 16, 17 and 26 of the International Covenant on Civil and Political Rights, and of article 16 (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, is arbitrary and falls within categories I, III and V.

83. Consequent upon the opinion rendered, the Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of Ms. al-Qaradawi and Mr. Khalaf without delay and bring it into conformity with the standards and principles set out in international norms on detention, including those set out in the Universal Declaration of Human Rights.

84. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to immediately release Ms. al-Qaradawi and Mr. Khalaf and accord them an enforceable right to compensation and other reparations, in accordance with international law.

85. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. al-Qaradawi and Mr. Khalaf, and to take appropriate measures against those responsible for the violation of their rights.

86. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for appropriate action.

**Follow-up procedure**

87. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Ms. al-Qaradawi and Mr. Khalaf have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Ms. al-Qaradawi and Mr. Khalaf;

(c) Whether an investigation has been conducted into the violation of the rights of Ms. al-Qaradawi and Mr. Khalaf and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Egypt with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

88. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

89. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

90. The Working Group requests the Government to disseminate through all available means the present opinion among all stakeholders.

91. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views

and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken. [18]

[*Adopted on 23 April 2018*]

[18] See Human Rights Council resolution 33/30, paras. 3 and 7.

United Nations A/HRC/WGAD/2018/27

General Assembly

Distr.: General
26 July 2018

Original: English

**Human Rights Council**
**Working Group on Arbitrary Detention**

# Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

## Opinion No. 27/2018 concerning a minor whose name is known to the Working Group (Egypt)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 16 January 2018 the Working Group transmitted to the Government of Egypt a communication concerning a minor whose name is known to the Working Group. The Government replied to the communication on 27 March 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

GE.18-12380(E)
*1812380*

Please recycle

**Submissions**

*Communication from the source*

4. The source reports that at the time of his arrest, the minor was 17 years old and a student attending a secondary school in the city of Mattay in Minya Governorate.

*Arrest and detention*

5. The source reports that on 14 August 2013, the minor was visiting his aunt's house in Mattay to celebrate his cousin's henna ceremony. Hearing noise, he stepped outside the house to see what was happening.

6. The source specifies that the house is located near the Mattay Police Station, which was attacked on 14 August 2013 by individuals allegedly responsible for the capture and murder of Colonel Mostafa Ragab Al-Atar, deputy sheriff of the Mattay Police Station, and the attempted murder of another police officer, First Lieutenant Kareem Fouad Hendawy. The source adds that this attack took place in the context of the nationwide unrest and violence that transpired following the dispersal of the pro-Morsi sit-in at Rabaa al-Adawiya Square in Cairo.

7. The source indicates that at no stage did the minor participate in any protests or violent acts taking place near his aunt's home on 14 August 2013, nor did he offer any encouragement to those who did.

8. The source alleges that, on 2 February 2014, in the middle of the night, thus nearly six months after the events of 14 August 2013, 25 police officers entered the home of the minor's family in the village of Koum Bassal, Mattay, and arrested the minor. The police officers did not produce any identification or warrant authorizing his arrest, despite appeals from his sister-in-law to do so. The reasons for the minor's arrest were not provided to him until the following day.

9. According to the source, following his arrest, the minor was taken to Mattay Police Station where he was detained until 23 March 2014. During this time, he was hospitalized for five days at Mattay General Hospital for an infection of his lymphatic glands.

10. Reportedly, on 23 March 2014, and without providing an explanation to either the minor or his family, the minor was transferred to the Minya Transfer Prison (Segn al-Tarheelat). The source reports that, while he was there, the minor was subjected to physical and psychological abuse. He was detained in an overcrowded cell, 3 metres square, with 20 to 24 other inmates. The conditions forced the minor to take turns with his cellmates sleeping on the hard concrete floor, leading to severe sleep deprivation and physical and mental distress.

11. Allegedly, on 6 August 2014, during his detention at Minya Transfer Prison, the minor was beaten by prison guards when they discovered a contraband mobile phone in his possession. In the period directly following this assault, the minor was denied adequate medical attention and his family were denied access to him.

12. The source acknowledges that the minor was permitted to continue his studies in prison. However, imprisonment has negatively impacted his education. For example, he was chained and guarded during exams, which has had a serious detrimental impact upon his performance in assessments.

13. The source also reports that, on or around 21 August 2014, the minor was transferred to Minya General Prison, where he was placed in solitary confinement and continued to be subjected to physical and mental abuse. Around this time, and at least five months after his trial, he was informed that he had been found guilty by the court and sentenced to death. This caused him mental distress, which was exacerbated by his placement in solitary confinement without explanation.

14. The source then explains that, on or around 11 November 2014, the minor was transferred to the Minya East High Security Prison where he was once again placed in solitary confinement. He remained in solitary confinement until 24 January 2015, when the

Court of Cassation overturned the lower court's verdict and ordered a retrial of the case, as developed in the following section.

15. The source further claims that during his imprisonment the minor has routinely been denied access to his lawyers and his family. The minor was permitted to meet with a lawyer one time after his arrest, and has not seen his lawyer since. As a result, the minor had no opportunity to discuss or prepare his defence with his lawyer.

16. The source asserts that the minor's health and well-being have also suffered due to his limited contact with his family. Apparently, while his family has made several journeys to visit him, there have been multiple occasions when his family has been denied an opportunity to talk to him. For example, following his beating in August 2014, family members were refused permission to visit him. On four other consecutive occasions, family members were told by prison officials that they had to have a permit from the public prosecutor to visit. In response, the public prosecutor told the family each time that no permit was required, as the minor had already been sentenced. When visits have been permitted, meetings have often been very brief with no designated meeting space. Because the minor has also been denied communication with anyone outside the prison, his family has often been uninformed of his place of imprisonment, forced to make its own enquiries as to his whereabouts and well-being through other families visiting fellow inmates. Since the Court of Cassation overturned the minor's original sentence, his family members have visited him every three weeks. The cost of travelling to and from the prison prohibits them from visiting more frequently.

*Trial*

17. The source reports that, from 22 to 24 March 2014, the minor's case was heard by the Minya Criminal Court as part of a mass trial alongside 544 other defendants. All defendants were charged with similar offences related to the alleged murder of Colonel Mostafa Ragab al-Atar, the attempted murder of First Lieutenant Kareem Fouad Hendawy, and related offences including damaging public property, seizing weapons, conducting an illegal public gathering and being members of a banned organization. The minor himself was not charged with Colonel al-Atar's murder, but was charged with the attempted murder of First Lieutenant Hendawy.

18. The source explains that proceedings on 22 March 2014 lasted for less than an hour. Only two days later, on 24 March 2014, the judge found 529 of the 545 defendants guilty and sentenced them to death without providing any evidentiary basis for the ruling. The judge acquitted the remaining 16 defendants, again without providing any reasoning for his decision.

19. According to the source, the trial was rife with procedural irregularities and breaches of both domestic and international law. In particular, many defence lawyers were denied access to the courtroom during the trial and those who were able to enter the courtroom were prevented from arguing individual cases. The minor had no opportunity to properly present his defence before the court.

20. In addition, the source reports that the judge also denied to the defence counsels the opportunity to cross-examine the prosecution's sole witness, a police officer. Furthermore, the defence was not permitted to submit witness testimonies in support of the defendants. These witnesses included local police officers and neighbours of the minor's aunt, who would have confirmed that the minor did not participate in the alleged attack on the police station. Defendants were also not afforded the right to testify, nor were questions put to the defendants by the court or the prosecution, thus depriving the defendants and their counsel of any opportunity to contest the charges brought against them.

21. Moreover, the source claims that, on the first day of the trial, the prosecution produced several thousand pages of new material. The submission of such a large body of evidence without the defence having first had an opportunity to consider its contents, should have resulted in the judge granting the defence additional time to examine the new evidence. Yet, the judge denied such a request.

22. The source also specifies that defence lawyers sought to have the judge recuse himself from the case, but these requests were ignored and the judge instead ordered that the defence lawyers be surrounded by armed guards.

23. Reportedly, on 24 March 2014, the judge handed down death sentences to 529 of the 545 defendants, including the minor. Following the consideration of the sentences by the Grand Mufti of Egypt, the next month the judge commuted 492 of the death sentences to life imprisonment, leaving in place 37 of the original death sentences, including that of the minor.

24. The source reports that on 24 January 2015, the Court of Cassation subsequently overturned the convictions of 152 defendants involved in the original hearing (including those of the 37 defendants who remained subject to the death penalty, among them the minor), and ordered a retrial before the Minya Criminal Court. In its judgment, the Court of Cassation specifically noted that the defendants in the original hearing had not been afforded the opportunity to present their defence. The judgment also noted that some defendants, including the minor, had not been correctly treated as minors and thus were not afforded appropriate protections under both domestic and international law.

25. Since the Court of Cassation overturned the lower court's original decision in January 2015, 15 separate hearings in the minor's retrial have taken place: in March, June, July, October and December 2015; in March, April, July, September, November and December 2016; and on 4 January, 11 March, 5 April and 10 May 2017.

26. According to the source, on 7 August 2017, the Minya Criminal Court of Appeal delivered a verdict in the mass trial of about 400 persons, in which the minor was a co-defendant facing the death penalty for offences alleged to have been committed as a minor. Of the defendants, 12 had their death sentences upheld, 228 were acquitted, 157 were sentenced to life in prison and 2 received 10-year prison sentences. Reportedly, the minor was one of the two co-defendants receiving a 10-year sentence, with time served.

*Legal analysis of the deprivation of liberty*

27. The source submits that the arrest and deprivation of liberty of the minor can be qualified as arbitrary under categories I and III.

*Category I*

28. The source argues that the failure to produce a warrant for the arrest of the minor, the failure to bring his detention into conformity with the law and the fact that the law is broadly defined constitute the basis for the establishing the minor's arbitrary detention, as there is no legal basis justifying the minor's arrest.

29. Regarding the failure to produce an arrest warrant, the source alleges that the Egyptian authorities failed to present a warrant when arresting the minor despite requests for this document from his family. The Egyptian authorities have failed to produce this document to date. As such, the authorities have failed to comply with article 40 of the Code of Criminal Procedure of Egypt and have failed to show that there were reasonable grounds for the minor's arrest.

30. The source claims that, owing to the failure to respect the procedure established by Egyptian law, there is no legal basis for the minor's arrest, and consequently his detention. His unlawful arrest is aggravated by the State's failure to recognize him as a juvenile and implement the enhanced requirements to protect children who have allegedly infringed the Penal Code from arbitrary arrest.

31. Regarding the failure to bring the minor's detention into conformity with the law, the source notes that authorities have failed to review his detention in line with domestic legislation and article 37 of the Convention on the Rights of the Child, to which Egypt is a party. Reportedly, the relevant legal bases applicable to the minor's pretrial detention are articles 142 and 143 of the Code of Criminal Procedure. According to the source, article 142 of the Code of Criminal Procedure provides that pretrial detention without charge elapses after 15 days, after which the public prosecutor must bring the suspect before a judge to authorize any further detention for a period not exceeding 45 days. Furthermore,

article 143 of the Code provides that, where the accused faces charges that carry a death or life sentence, pretrial detention can be extended for 45-day periods indefinitely upon the authorization of the court hearing the case or the Court of Cassation.

32. Yet, the source claims that the public prosecutor did not bring the minor before a judge to authorize the extension of his pretrial detention upon the elapse of the first 15-day period following his arrest in February 2014, in direct contravention of article 142 of the Code of Criminal Procedure. Moreover, no official request for the minor's continued detention after his arrest has ever been presented to him, his family or his legal counsel, in violation of article 143 of the Code of Criminal Procedure of Egypt.

33. The source notes that the minor was not brought before a judge until nearly two months after his arrest, upon his first appearance before the Minya Criminal Court on 22 March 2014. At this hearing, he was not provided with an opportunity to challenge the legality of his arrest or detention, and the case proceeded to judgment just two days later.

34. In addition, according to the source, the minor's initial conviction was overturned by the Court of Cassation on 24 January 2015, and the first hearing in his retrial did not commence until March 2015. The source notes that though this period exceeded the 15-day legal period, no document extending his detention was issued at this juncture either. While the decision of the Court of Cassation in January 2015 ordered the minor's detention in Minya High Security Prison, no attempts to bring him before the court to allow him to challenge his ongoing detention have been provided to him, in violation of article 143 of the Code of Criminal Procedure.

35. Furthermore, article 9 (3) of the International Covenant on Civil and Political Rights states that detainees should be entitled to "trial within a reasonable time or to release". The relevant period of detention in relation to article 9 (3) is the date of arrest or commencement of detention until the date of final judgment; this therefore includes the period of detention during any appeal or retrial phase.

36. The source asserts that the minor has been incarcerated for over two years since the initial verdict against him was overturned by the Court of Cassation. The source argues that the practice of keeping pretrial detainees incarcerated indefinitely clearly does not comply with the Covenant's article 9 (3) requirement that a trial conclude within a "reasonable time".

37. Finally, the source claims that the law is broadly defined, leading to arbitrary arrest and detention as it incorporates elements of "inappropriateness". The source explains that the mass trials conducted by Egyptian courts have followed charges under Law 10/1914, which ascribes criminal responsibility to any person present at an illegal assembly where an offence is committed. That practice has resulted in the arrest, detention and conviction of thousands of persons, and the handing down of death sentences to hundreds, for a range of offences, without considering individual responsibility for the offence. Such provisions clearly incorporate elements of unpredictability and abrogate due process. They allow anyone allegedly present at the time of an illegal assembly to be charged with serious offences, including murder. This facilitates unjust charging practices whereby collective responsibility is ascribed without the need to investigate individual responsibility for the offence, in clear violation of the due process of law, namely the right to be presumed innocent until proven guilty. The law therefore lacks predictability in its application because any person can be considered an accomplice to an offence by virtue of being in the vicinity of an illegal assembly. The source asserts that Law 10/1914 has been applied arbitrarily to conduct unlawful arrests, resulting in arbitrary deprivation of liberty. It has been used to charge, convict and sentence the minor to death on the basis of joint criminal responsibility, without regard to the due process of law, rendering his deprivation of liberty arbitrary under category I.

*Category III*

38. The source considers that the failure to recognize the rights of the child in the present case constitutes grounds for establishing arbitrary detention under category III. These failures include: the violation of the prohibition on the death penalty for juveniles; the failure to meet legal thresholds for a death sentence; the violation of the right to be free

from ill-treatment and to be treated with dignity; the violation of the right to a fair trial owing to trial en masse; the violation of the presumption of innocence; the violation of the right to be informed promptly of the charges; the violation of the right to a lawyer in the preparation of one's defence; the violation of the right to a public trial before a competent, impartial court; and the violation of the right to a trial without unreasonable delay.

39. The source claims that at the time of his arrest the minor was 17 years old and therefore a juvenile under domestic and international law. As such, Egypt was obligated to recognize the minor as a juvenile and to comply with the special rules for dealing with juveniles alleged to have infringed the penal law, as stipulated in articles 37 and 40 of the Convention on the Rights of the Child. The failure of the arresting authority and the public prosecutor to recognize the minor as a juvenile in conflict with the law resulted in non-compliance with the applicable international human rights standards, which Egypt is bound to uphold.

40. The source reports that article 111 of the Child Law of Egypt prohibits the imposition of a death sentence or life imprisonment on a minor. The minor's initial death sentence was therefore unlawful under domestic and international law.

41. The source claims that the minor has not been charged with an offence that meets the internationally recognized threshold of "most serious crimes", thus excluding the application of the death penalty. While the death penalty is not prohibited under international law, article 6 of the Covenant requires that retentionist States only apply capital punishment following strict adherence to due process and fair trial guarantees, and for offences that meet the "most serious crimes" threshold.

42. The source argues that the minor is not charged with an offence under Egyptian law that can carry the death penalty. The prosecution's request that the minor receive a death sentence upon retrial therefore runs counter to the duty of Egypt to ensure that capital punishment is only reserved for offences resulting in death.

43. The source reports that the minor has been subjected to egregious prison conditions and severe violations of due process. This constitutes a violation of the prohibition against ill-treatment and of the right to be treated with dignity. In particular, the source considers that the following facts constitute such a violation: (a) being beaten by prison guards; (b) being forced to share a small and severely overcrowded prison cell; (c) being placed in solitary confinement while imprisoned by State authorities; (d) being forced to submit to unsanitary prison conditions, which provoked severe health problems that led to the minor's hospitalization; and (e) being granted only limited access to family, thereby depriving the minor of family support. In addition, the source reports that until his eighteenth birthday, the minor was held in the Minya Transfer Prison, which is not a juvenile detention facility. During this period, he was detained in a cell with other individuals, and the source claims that some of them were adults. The source notes that the Minya Transfer Prison is not designated by the Egyptian Government as a place of detention for juveniles. This placed the minor at risk of ill-treatment and violated his rights under article 37 (c) of the Convention on the Rights of the Child. Moreover, the authorities' failure to use pretrial detention as a last resort and their detention of the minor without affording him recourse to challenge the legality of his arrest and detention amounts to the clear use of detention as a form of punishment.

44. The source claims that the minor's right to a fair trial was violated. In particular, the source claims that the prosecution's continued failure to sever or amend the indictment to recognize that the minor was a juvenile and rescind the request for the application of the death penalty reflects the arbitrary application of the law in order to secure convictions without due regard for fairness. In addition, in arresting and detaining the minor without a warrant and failing to bring his detention under any legal framework, the authorities have acted under the assumption that he is guilty of the alleged offences, violating the presumption of innocence. In particular, the Egyptian authorities' continued inappropriate pretrial detention of the minor indicates the Government's belief that his guilt has been predetermined. The minor's lengthy pretrial detention without judicial oversight amounts to a clear use of pretrial detention as punishment, running counter to the presumption of innocence.

45. Furthermore, the source recalls that the minor's first meeting with his legal representative occurred two months after his arrest, at his first appearance before the Minya Criminal Court on 22 March 2014. The authorities therefore did not provide the minor with the appropriate conditions for him to confer with a lawyer that would have enabled the preparation of a substantive defence.

46. The source also argues that the failure of the prosecution to provide the minor's lawyers with disclosure of the case against him prevented him from preparing an appropriate defence on his behalf or challenging the prosecution's evidence against him. In turn, the prosecution acted in violation of the principle of equality of arms, prejudicing the minor's ability to mount a meaningful defence. Moreover, the Court failed to uphold the minor's right to effective participation in the proceedings against him. This right includes ensuring the minor comprehends the charges and possible consequences and penalties in order to direct his legal representative when challenging witnesses, providing an account of events and in making appropriate decisions, inter alia, about evidence and testimony.

47. Therefore, the source claims that by acting in violation of the minor's right to legal counsel, the Court failed to provide him with the opportunity to direct his lawyer appropriately in the preparation of his defence and to comprehend the nature of the proceedings against him. Further, neither the minor nor his lawyers were permitted time to address the court, nor was he called to give testimony, in clear contravention of his right to participate in the trial.

48. Therefore, according to the source, the Egyptian authorities have severely constrained the minor's right to adequate time and appropriate facilities to prepare his defence, in contravention of his fair trial rights enshrined in article 40 of the Convention on the Rights of the Child and article 14 of the International Covenant on Civil and Political Rights.

49. Moreover, the source claims that the Minya Criminal Court was not competent or impartial: the Court's failure to uphold the minor's right to full equality of arms in the proceedings against him, while providing the prosecution with full procedural rights in presenting its case, shows bias in favour of the State. This bias is further supported by the Court's decision to issue a judgment in a mass trial of 545 defendants after just two hearings, as it cannot be objectively reasoned that the minor's individual criminal responsibility for the crimes he has allegedly committed was given due regard. Furthermore, the Minya Criminal Court was not competent to hear the minor's case. According to the source, the Child Law establishes a separate justice system for minors. The source also claims that the trial was not public, therefore resulting in a breach of the law. Indeed, the Court tried the minor in closed hearings with the intention of obscuring the transparency of the proceedings, rather than protecting his right to privacy. The minor's family were barred from attending the hearings in the case. The minor himself has been prevented from attending certain proceedings, including the second session of the initial trial when his sentence was handed down (to which the minor's lawyer was also denied access). The minor did not learn of the outcome of this second hearing until five months after it took place.

50. Finally, the source claims that the procedural delay of over two years is in violation of the minor's right to trial without undue delay, enshrined in article 14 (3) (c) of the Covenant.

*Response from the Government*

51. On 16 January 2018, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting the Government to provide detailed information by 18 March 2018 concerning the current situation of the minor and any comment on the source's allegations. On 8 March 2018, the Government sought an extension of the deadline to submit its response. In conformity with paragraph 16 of its methods of work, the Working Group granted an extension for the Government to submit its response by 2 April 2018. The Government submitted its response to the regular communication on 27 March 2018.

52. In its response, the Government affirms, firstly, that the Egyptian legal system affords sufficient safeguards to those deprived of their liberty, in conformity with international standards, including articles 9 and 10 of the International Covenant on Civil and Political Rights and articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. Torture by officials is also liable to punishment under the Penal Code and the health rights of persons deprived of their liberty are protected.

53. According to the Government, the minor was arrested and interrogated by the public prosecutor in case No. 8473 of 2012, Mattay (reference No. 1842 of 2013 North Minya). The public prosecutor initiated the accusations against the minor and others by order of referral No. 115 on 14 August 2013 in Mattay Directorate, Minya Province. The co-defendants were accused of gathering with the purpose of committing crimes against persons and properties; intimidating victims; murder; attempted murder; the use of force and violence against public officials; destruction of State-owned buildings; damaging public assets (Mattay Police Station and police cars); disruption of work at a public office (Mattay Police Station); setting Mattay Police Station on fire; deliberate destruction of original files and records of State documents at Mattay Police Station; assisting the escape of 12 arrested persons; possession of machine guns and ammunition; and the possession of other weapons, such as sticks, batons, stones and Molotov cocktails.

54. On 9 April 2014, the case was referred to the criminal court, which ordered the continued detention of the accused and the issue of arrest and detention orders against the fugitives tried in absentia. According to the public prosecutor, the minor was arrested on 28 April 2014 and was detained until 23 August 2014 in a legally allocated place at the Mattay Police Station in accordance with the court referral order.

55. On 7 August 2017, the court sentenced the minor to a 10-year prison term and ordered the transfer of the weapons seized to the Ministry of the Interior, the confiscation of weapons and ammunition possessed by any of the accused persons and the payment of a fine equal to the value of the damaged properties.

56. On 27 August 2017, the minor decided to challenge the verdict under reference No. 1177. Case No. 10675 was referred to the Court of Cassation on 28 October 2017.

57. The Government states that the minor was already 18 and not 17 years old at the time of his imprisonment as an adult.

58. The Government also states that the minor received a medical examination in prison that showed no specific illnesses. It also claims to possess the visitation record for the minor from the beginning of his detention, which shows that he received his last visit on 28 February 2018. Since the minor had submitted no complaint to the competent authorities, the source's allegations are invalid and lack factual or legal evidence.

*Further comments from the source*

59. The response from the Government was transmitted to the source for its further comments on 27 March 2018. In its response of 12 April 2018, the source submits that the Government has not responded to the substance of the allegations of the minor's arbitrary arrest, detention and trial. In particular, the Government has failed to address the procedural history of his mass trial and initial death sentence delivered while he was a juvenile and has made factually inaccurate representations.

60. The source submits that the minor was arrested on 2 February 2014 when he was 17 years and 5 months old, and refers to the complete absence in the Government's submission of any mention of the mass trial of more than 500 individuals, including the minor, in March 2014 and of the death sentences issued for 37 of the co-defendants, including the minor, delivered on 24 March 2014 (the written judgment was issued on 28 April 2014) when he was 17 years and 9 months old. The accused was a minor at the time of his alleged crime in August 2013 and also at the time of his arrest and initial sentencing. The Government's claim that the minor was arrested on 28 April 2014 is erroneous as he had been in custody for more than two months by that time and had already been sentenced to death. Nor does the Government acknowledge the Court of Cassation's judgment overturning the minor's death sentence, along with a number of others, from the minor's

initial mass trial, which cited, among other things, the minor's age as one of the grounds for the reversal. The 10-year sentence against the minor, referred to by the Government, was actually from his retrial and is currently the subject of a second appeal before the Court of Cassation.

61. In addition, according to the source, the Government has not addressed the violations of the minor's rights: to a fair trial, owing to the mass trial; to be informed promptly of the charges and to be tried without delay; to a lawyer for the preparation of his defence; to a public trial before a competent, impartial court; and to a trial without unreasonable delay.

62. The source further emphasizes that the Government has not provided details about the legality of the minor's detention and whether the Government will investigate his allegation of ill-treatment in prison in accordance with its obligations under the international and domestic laws that it cites.

**Discussion**

63. The Working Group thanks the source and the Government for their extensive engagement and for their submissions in relation to the minor's detention.

64. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).

65. The Working Group recalls that where it is alleged that a person has not been afforded by a public authority certain procedural guarantees to which he or she was entitled, the burden of proof should rest with the public authority, because the latter is in a better position to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law.[1]

66. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international or regional instruments.[2] Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.[3] The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[4]

*Category I*

67. The Working Group will examine the relevant categories applicable to its consideration of this case, including category I, which concerns deprivation of liberty without invoking any legal basis.

68. While the Government states that the minor was arrested in accordance with the law and due process, and that its laws provide for the legal guarantees and judicial supervision

[1] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 660–661, para. 55; and opinions Nos. 41/2013, para. 27, and 59/2016, para. 61.

[2] See General Assembly resolution 72/180, fifth preambular paragraph; Commission on Human Rights resolutions 1991/42, para. 2, and 1997/50, para. 15; and Human Rights Council resolutions 6/4, para. 1 (a), and 10/9.

[3] See opinions Nos. 94/2017, para. 47; 76/2017, para. 49; 1/2003, para. 17; 5/1999, para. 15; and 1/1998, para. 13.

[4] See opinions Nos. 94/2017, para. 48; 88/2017, para. 24; 83/2017, para. 60; 76/2017, para. 50; and 33/2015, para. 80.

in accordance with international standards, it has been unable to provide the Working Group with the correct date of his arrest, initial trial and death sentence and appeal. This wholesale omission of key information raises doubts about the purported documentary evidence presented by the Government. In any case, the Government has not provided a copy of the arrest warrant for the minor's arrest. According to the information provided by the source, which the Government has failed to rebut with credible evidence, the minor was arrested not on the alleged "crime scene", in flagrante delicto, but nearly six months after the event of 14 August 2013, without the presentation of a warrant. In principle, arrest without a valid warrant must be considered ipso facto a violation of articles 3 and 9 of the Universal Declaration of Human Rights, articles 9 (1) of the International Covenant on Civil and Political Rights and article 37 (b) of the Convention on the Rights of the Child for want of a legal basis.

69. The alleged legal basis for the minor's arrest and detention further suffers from other serious defects. As stated in paragraph 12 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, deprivation of liberty is regarded as unlawful when it is not on such grounds and in accordance with procedures established by law. In order to ascertain such a legal basis, the authorities should have informed the minor of the reasons for his arrest or charges against him at the time of his arrest, but this did not happen until the following day, in violation of article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant.

70. Furthermore, the minor was not brought promptly before a judge or afforded the right to take proceedings before a court so that it could decide without delay on the lawfulness of his detention in accordance with article 9 (3) and (4) of the Covenant and article 37 (d) of the Convention on the Rights of the Child. This also deprived him of an effective judicial remedy for the violation of his rights and freedoms, as provided in articles 8 and 10 of the Universal Declaration of Human Rights and articles 2 (3) and 14 (1) of the Covenant.

71. The Working Group also expresses its grave concern at the minor's incommunicado detention and denial of access to a lawyer. The Working Group, in its jurisprudence, has consistently argued that holding a person incommunicado breaches the right to challenge the lawfulness of detention before a judge.[5] Articles 8, 10 and 11 of the Universal Declaration of Human Rights, articles 2 (3), 9 and 14 of the Covenant and article 37 (c) and (d) of the Convention on the Rights of the Child also confirm the impermissibility of incommunicado detention.

72. Furthermore, the Committee against Torture has made it clear that incommunicado detention creates conditions that lead to violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see A/54/44, para. 182 (a)). The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also consistently urged States to declare incommunicado detention illegal (see A/54/426, annex, para. 42; and A/HRC/13/39/Add.5, para. 156). The beatings and denial of medical care endured by the minor appear to confirm the serious concerns about incommunicado detention. An arrestee or detainee that is beaten and sick, in violation of articles 5 and 25 (1) of the Universal Declaration of Human Rights, articles 7 and 10 of the International Covenant on Civil and Political Rights and article 37 (c) of the Convention on the Rights of the Child, will find it difficult to take proper judicial proceedings to challenge the lawfulness of detention.

73. The Working Group therefore considers that the minor's arrest, detention and imprisonment lack a legal basis and are thus arbitrary, falling under category I.

[5] See opinion No. 93/2017, para. 49.

*Category III*

74. The Working Group will now consider whether the violations of the right to a fair trial and due process suffered by the minor were of such gravity as to give his deprivation of liberty an arbitrary character, falling within category III.

75. While the reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case, taking into account the complexity of the case and other relevant elements, the Working Group considers that the excessive delay from the time of arrest to the end of trial is in violation of article 11 (1) of the Universal Declaration of Human Rights and articles 9 (3) and 14 (3) (c) of the International Covenant on Civil and Political Rights, and that the burden lies with the Government to prove its legitimacy, necessity and proportionality. In this instance, the minor has been held in custody since his initial arrest on 2 February 2014. The Government failed to provide any justification for the minor's continued pretrial detention even though the Court of Cassation quashed his initial conviction and death sentence on 24 January 2015 and the trial court did not deliver its 10-year sentence against the minor until 7 August 2017. In this regard, the Working Group finds that the Government neither tried the minor within a reasonable time nor released him, in violation of article 11 (1) of the Universal Declaration of Human Rights and articles 9 (3) and 14 (3) (c) of the Covenant. Such a delay also breached the minor's right to appeal, in violation of the article 14 (5) of the Covenant.

76. Furthermore, the Government did not respect the minor's right to legal assistance at all times — which is inherent in the right to liberty and security of person — and his right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3 and 9 of the Universal Declaration of Human Rights, articles 9 (1) and 14 (1) of the International Covenant on Civil and Political Rights and articles 37 (d) and 40 (2) (b) (ii) and (iii) of the Convention on the Rights of the Child. According to the source, the minor's first meeting with his legal representative occurred two months after his arrest, at his first appearance before the Minya Criminal Court on 22 March 2014, two days before he was convicted and sentenced to death; the Government therefore did not provide him with the appropriate conditions for him to confer with a lawyer that would have enabled the preparation of a substantive defence. The Government recited the provisions of the Constitution but provided no substantial rebuttals to the source's specific claims.

77. The Working Group also has serious doubts about the fairness of a trial for more than 500 defendants, where the judgment was delivered in just two days after proceedings that lasted less than an hour. The death sentences imposed on more than 500 defendants and the lack of individual sentences fall short of the requirements for a fair trial and are arbitrary in themselves. Then, although the minor's conviction and death sentence were overturned by the Court of Cassation, he was again convicted and sentenced to 10-year prison term in yet another mass trial of almost 400 defendants.[6] The Working Group therefore concludes that his right to a fair trial has been repeatedly violated.

78. Specifically, the Working Group considers that the imposition of the death penalty following a flawed procedure is in violation of article 6 (2) of the International Covenant on Civil and Political Rights, which provides that the imposition of the death penalty should not be contrary to other provisions of the Covenant.[7]

79. The Working Group further finds the death sentence imposed on a minor at the time of the commission of an alleged crime is in violation of both customary international law and the domestic law of Egypt. Article 6 (5) of the Covenant states unequivocally that the death sentence "shall not be imposed for crimes committed by persons below eighteen years of age". Article 37 (a) of the Convention on the Rights of the Child also clearly prohibits capital punishment for persons below eighteen years of age. Indeed, the imposition of a death sentence for the act of a legal minor is a violation of the fundamental right to life stipulated in article 3 of the Universal Declaration of Human Rights as well.

[6] See opinion No. 41/2016, para. 27.

[7] See opinion No. 32/2017, para. 18.

80. The Working Group notes that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment specifically found that "international law does not attribute a different value to the right to life of different groups of human beings, such as juveniles … or persons sentenced after an unfair trial, but considers the imposition and enforcement of the death penalty in such cases as … in violation of article 7 of the Covenant and articles 1 and 16 of the Convention against Torture" (A/67/279, para. 58).

81. In the light of the foregoing, the Working Group concludes that the non-observance of the international norms relating to the right to a fair trial is of such gravity as to give the minor's deprivation of liberty an arbitrary character, falling under category III.

82. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for appropriate action.

83. The Working Group notes that the present opinion is only one of many other opinions in the past five years in which the Working Group finds the Government of Egypt to be in violation of its international human rights obligations.[8] The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.

**Disposition**

84. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of the minor, being in contravention of articles 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 25 of the Universal Declaration of Human Rights, of articles 2, 6, 7, 9, 10, 12 and 14 of the International Covenant on Civil and Political Rights and of articles 24, 37 and 40 of the Convention on the Rights of the Child, is arbitrary and falls within categories I and III.

85. The Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of the minor without delay and to bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

86. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release the minor immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

87. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of the minor and to take appropriate measures against those responsible for the violation of his rights.

88. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for appropriate action.

[8] See, for example, opinions Nos. 83/2017, 78/2017, 30/2017, 60/2016, 54/2016, 42/2016, 41/2016, 7/2016 and 6/2016. *The Working Group expresses its particular concern* at the spate of grave human rights violations, including arbitrary detention, following the 2013 coup d'état.

**Follow-up procedure**

89. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether the minor has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to the minor;

(c) Whether an investigation has been conducted into the violation of the minor's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Egypt with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

90. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

91. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

92. The Government should disseminate through all available means the present opinion among all stakeholders.

93. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[9]

[*Adopted on 24 April 2018*]

[9] See Human Rights Council resolution 33/30, paras. 3 and 7.